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Roger Atkinson; Polly Atkinson; Roger Atkinson and Polly Atkinson; Chad Atkinson v. IHC Hospitals, Inc., Intermoutnain Health Care Hospitals, Inc., Scott Wetzel Services, Inc., Scott Olsen; Stephen G. Morgan; Morgan, Scalley and Reading : Response to Petition for Rehearing

Utah Supreme Court

Dale F. Gardiner; Robert J. Debry and Associates; Attorneys for Plaintiffs.
Carman E. Kipp; Heinz J. Mahler; Kipp and Christian; Paul S. Felt; Ray, Quinney and Nebeker.

BRIEF

IN THE UTAH SUPREME COURT
STATE OF UTAH

ROGER ATKINSON; POLLY ATKINSON; and ROGER ATKINSON and POLLY ATKINSON, as guardians ad litem for CHAD ATKINSON, Plaintiffs/Appellants, v. IHC HOSPITALS, INC. a/k/a INTERMOUNTAIN HEALTH CARE HOSPITALS, INC., a Utah corporation, SCOTT WETZEL SERVICES, INC., a corporation, SCOTT OLSEN; STEPHEN G. MORGAN; MORGAN, SCALLEY & READING; and JOHN DOES I through X, Defendants/Respondents.	:	IHC HOSPITALS, INC.'S BRIEF OPPOSING PETITION FOR REHEARING Civil No. 88-0310 Category 10 or 16

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November 15, 1989

Clerk of the Court
Utah State Supreme Court
Utah State Capitol Building
Salt Lake City, Utah 84114

Re: Roger Atkinson v. IHC Hospitals, Inc., et al.
No. 88-0310

Dear Clerk of the Court:

Pursuant to Rule 24(j) of the Rules of the Supreme Court, respondent IHC Hospitals, Inc. hereby advises the Court of a decision which has recently come to counsels' attention.

The argument beginning on page is 30 of this respondent's brief, "B. Applicability of the Statute of Limitations to a Minor is Constitutional", should be supplemented with the following citation:

> Douglas v. Hugh A. Stallings, M.D., Inc., 870 F.2d 1242 (7th Cir. 1989) (limits imposed on a brain damaged minor by the malpractice statute of limitations are rationally related to the goals of preventing stale claims and controlling the cost of medical care; the state need not provide a tolling provision for minority and mental incompetents or a discovery rule in order to comply with due process guarantees).

A copy of this letter is being sent to all counsel.

Very truly yours,

KIRTON, McCONKIE & POELMAN

David B Erickson

David B. Erickson

DBE/kp

cc: Carman E. Kipp
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February 8, 1990

Geoffrey J. Butler
Clerk of the Court
Utah Supreme Court
332 State Capitol Bldg.
Salt Lake City, UT 84114

Dear Mr. Butler:

RE: Atkinson v. IHC Hospitals, Inc. et al
No: 88-0310

Pursuant to Rule 24(j) of the Rules of the Utah Supreme Court, appellant responds to the newly uncovered authority of Douglas v. Hugh A. Stallings, M.D. Inc., 870 F.2d 1242 (7th Cir. 1989), cited by IHC Hospital.

Appellant believes that Douglas is not additional authority because the Federal Courts apply different criteria in deciding equal protection cases than does the Utah Supreme Court. e.g. Condemarin v. University Hospital, 107 Utah Adv. Reptr. 5, 8, 20, 22 (1989); Mountain Fuel Supply Co. v. Salt Lake City, 752 P.2d 884, 889 (Utah 1988); Malan v. Lewis, 693 P.2d 661 (Utah 1984).

Sincerely,

ROBERT J. DEBRY & ASSOCIATES

ROBERT J. DEBRY

RJD\jn

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January 5, 1989

Geoffrey J. Butler
Clerk of Utah Supreme Court
332 State Capitol Building
Salt Lake City, Utah 84114

Re: Atkinson v. IHC Hospitals, Inc. aka Intermountain Health Care Hospitals, Inc., et al.
Case No. 88-0310

Dear Mr. Butler:

Pursuant to Rule 24(j) of the Rules of the Utah Supreme Court, Respondents Scott Wetzel Services, Inc. and Scott Olsen wish to cite to the Court its recent decision in Chapman v. Primary Children's Hospital, et al., No. 860392, filed December 27, 1989. In that case, as in this case, plaintiffs made a claim against Scott Wetzel Services that statements made by a Scott Wetzel representative amounted to fraudulent concealment of medical malpractice. In Chapman, the Utah Supreme Court stated:

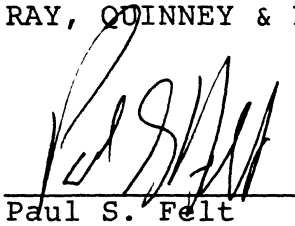
> In the case of defendants Scott Wetzel Company and The Home Group, we hold that, even if the Chapmans' claims are take as true, no fiduciary relationship existed between the Chapmans and these defendants sufficient to give rise to a duty of disclosure... However, our cases dealing with fraudulent concealment indicate that neither material omissions nor fraudulent affirmative statements are actionable absent a duty to speak the truth. See Sugarhouse Finance Co. v. Anderson, 610 P.2d 1369, 1373 (Utah 1980); Elder v. Clawson, 14 Utah 2d 379, 382, 384 P.2d 802, 804 (1963).

In this case, the Scott Wetzel Company was under an independent contract to Intermoutain Health Care--the parent corporation of Primary Children's Hospital--to investigate accident claims involving Intermountain Health Care; it had no responsibility to the Chapmans.

Although the issues on appeal in the Atkinson case have so far centered around the release signed by appellants, various statute of limitations defenses and collateral estoppel, it is axiomatic that the ruling in the Chapman case is directly on point and relieves Scott Wetzel Services and Scott Olsen from any fiduciary relationship or duty of disclosure to the appellants in Atkinson. Therefore, appellants have no cause of action against Scott Wetzel Services and Scott Olsen and the summary judgment should be affirmed.

Respectfully submitted this 5th day of January, 1990.

RAY, QUINNEY & NEBEKER



Paul S. Felt
Attorneys for Respondents Scott Wetzel Services, Inc. and Scott Olsen

cc: Robert J. DeBry
B. Lloyd Poelman
Carman E. Kipp

IDENTITY OF PARTIES

Appellants:	Chad Atkinson (Minor) Roger Atkinson Polly Atkinson
Respondents:	Scott Wetzel Services, Inc., a Utah corporation, and Scott Olsen, employee and manager of Wetzel
	IHC Hospitals, a/k/a Intermountain Health Care Hospitals, Inc.; and Primary Children's Hospital, a hospital operated by Intermountain Health Care Hospitals, Inc.
	Stephen G. Morgan and Morgan, Scalley & Reading

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PRELIMINARY STATEMENT

IHC Hospitals, Inc., a/k/a Intermountain Health Care ("IHC") opposes the petition for rehearing.

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over the Petition for Rehearing and of the appeal pursuant to Utah Code Annotated § 78-2-2(3)(j); see also Rule 35, Utah Rules of Appellate Procedure.

FACTS

Roger Atkinson and Polly Atkinson, individually and as guardians ad litem for Chad Atkinson (collectively, the "Atkinsons"), alleged (1) that the settlement of approximately $1 million for Chad Atkinson, approved more than four years before the Atkinsons brought this suit, should be reopened or reconsidered and (2) for alleged attorney malpractice (see Record ["R."] 415-18). The trial court granted summary judgment, and this Court unanimously affirmed. Atkinson v. IHC Hospitals, 138 Utah Adv. Rep. 3 (S.Ct. 1990).

ARGUMENT

I. NO ERROR OF LAW HAS BEEN MADE; NO ERROR WILL BE REPEATED.

Quoting limited portions of this Court's opinion, the Atkinsons assert that this Court has overlooked the mandate of the Legislature that a court must "determine[]" that a transaction is in the best interests of the protected person. Utah Code Ann. § 75-5-409(2). Careful review of the probate court

opinion,[1] this Court's opinion, the statute and the transcript of the proceedings of the probate court[2] reveals no error.

The probate court had the text of the settlement terms and release available to review[3] and the parents to question about their understanding of the terms. The probate court was adequately and properly apprised. Even the Atkinsons' partial quotation, with significant ellipses, from this Court's opinion does not impose new standards or shirk from statutory responsibilities. There is no error of law which may be repeated to the detriment of "hundreds" of future litigants.

After quoting 42 Am. Jur.2d Infants, § 154 (1969) and referring to Kansas and Tennessee cases[4] about evaluating settlements of infants' claims, the only "evidence" which the Atkinsons quote to try to demonstrate that the probate proceedings were inadequate is one question addressed to Judge Fishler at his deposition. He answered that he did not evaluate the underlying claim against IHC. (Fishler Dep. at 51.)

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[1] A copy of the probate court's decision is attached as Addendum F to the brief on appeal of Respondents Morgan and Morgan, Scally & Reading (the "Morgan Brief").

[2] See Transcript of Settlement, Fishler, J., July 22, 1983 ("Tr.") attached as Addendum A to Morgan Brief.

[3] Addenda C, D and K to Morgan Brief.

[4] Western Life Ins. Co. v. Nanney, 290 F.Supp. 687 (C.D. Tenn 1968); Missouri Pacific R. Co. v. Lasca, 99 P. 616 (Kan. 1909). Petitioners also refer to Perry v. Umberger, 65 P.2d 280 (Kan. 1909).

Neither Am.Jur.2d nor the cited cases require an evaluation of the underlying claim -- this supposed requirement is imposed only by the Atkinsons in their argument. The factors enumerated by the cited authorities were all well-covered by Judge Fishler's review of the nature of the injury (brain damage), the amount recovered ($900,000 [guaranteed][5]), the fact that both Mr. and Mrs. Atkinson believed the child had a claim against IHC, their understanding that they could not sue IHC again regardless of changes in the child's condition and the terms and conditions of the settlement and recovery, which provided, in part, that the child's injuries "are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite. . . ." (Addendum C to Morgan Brief.)

The probate judge was entitled to consider whether the parents thought the settlement reasonable in making his own determination, but that is not, as the Atkinsons imply, the only thing he considered. The judge was also entitled to impose conditions for the child's interests -- which he did by requiring the parents to be bonded and to submit annual reports. Judge Fishler stated in his affidavit:

> Among other things the Court verified with the parents that they did not intend to obtain an attorney and that they had con-

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[5] The settlement guarantees $900,000 plus certain free medical care for the child. If the child lives to age 65, the settlement will be worth at least $1.28 million. IHC has complied with the settlement requirements and has made and continues to make timely payments.

> sulted with an outside lawyer. (see page 2 of the transcript, lines 7 thru 14 [sic].)
>
> 7. The affiant ascertained that both parents desired to complete the settlement as they had agreed with Intermountain Health Care, Inc., and that they felt that it was in the best interest of the child and themselves, and that upon hearing their testimony, the Court concluded that it was in the interest of the minor and the parents to complete the settlement terms which had been agreed between the parties.

Fishler Affidavit, Addendum P to Morgan Brief, emphasis added.

Moreover, the Petition for Appointment of Conservator and Order to Approve Settlement recited that the "child sustained accidental injuries while in the care" of an IHC hospital and that the injuries from a plugged breathing tube "involved brain damage, to an extent which has not been ascertained at this time. . . ." (Addendum B to Morgan Brief.) Judge Fishler had ample information before him.

Nothing in the proceedings deprived the child of the benefit of some $900,000 for his brain damage, free medical care (which has been extensive), funds for education. The parents also received money. Every reasonable precaution was taken to assure that the funds would be used for the child in accord with the structured settlement.

It is the Atkinsons who err by trying to assert that approval was granted without, for example, consideration of the settlement agreement and release, which they brought to the

probate court. As this Court correctly concluded, everything was done in a jurisprudential manner.

II. THE PETITIONERS' CONTENTIONS AND ARGUMENTS LACK MERIT.

1. The Parents' Age Is Irrelevant.

The Atkinsons claim that their age and recently alleged illiteracy at the time the settlement was approved require new proceedings. Mr. Atkinson, the father, was then 19, having reached his majority. He was legally competent to vote, to enlist in the military, to marry and to have left compulsory schooling. His parents no longer had any obligation to support him.[6] He was old enough to be appointed as the guardian of his child and to be trusted to manage, together with his wife, approximately $1 million in benefits and payments for his child. He had a tenth-grade education but now asserts, without proof, that he was barely able to read. The law imposes no literacy test on marrying, on fathering, or on parenting.[7]

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[6] See, inter alia, United States Constitution, Amendment XXVI, Utah Code Ann. §§ 53A-11-101, 78-45-3.

[7] The Court specifically asked Mrs. Atkinson if she understood that she would have no future claim against IHC even if the child's condition worsened, and she said she did. (Tr. at 2.) Significantly, the Atkinsons allege only Mr. Atkinson's near illiteracy, avoiding the question whether Mrs. Atkinson was truthful when she said she understood. Mr. Atkinson was able to answer oral questions, showing his personal understanding of the questions asked. (Tr. at 3-4.)

Mrs. Atkinson, aged 16, was a married woman, willing to give birth and willing to apply for and accept the court-ordered guardianship (with her husband) of her child. She is the beneficiary of years of effort by women to be recognized as persons, not chattel, under the law.[8] The Court should not ignore laws according rights to women. This is not the case nor the time to reverse statute and precedent. The Atkinsons' allegations about age and illiteracy are not persuasive and do not justify rehearing.

No one ever questioned the Atkinsons' right as parents to keep their child, nor have there been any allegations of their inability to serve as his parents and his legal guardians or to provide his daily nurture. Had there been no injury to their child, the law would have had no concern with his care, unless they violated child support or criminal statutes.[9]

The law permits young and old parents to raise their children; it should not, because of the Atkinsons' age, favor them with relief from a settlement they supported in court. The Atkinsons should not benefit from age discrimination. The

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[8] See, e.g., Utah Code Ann. 63-3-1 et seq.

[9] Indeed, if persons of their respective ages had had a child born out of wedlock, they could have decided whether to marry, whether to place the child for adoption (terminating all parental rights) or whether one or the other would retain custody with the possibility of receiving support from and according visitation to the other.

Atkinsons cannot be permitted to pick and choose their rights, responsibilities and competencies.

Moreover, the Atkinsons have failed to show any causal connection between their ages or their alleged illiteracy and the value of the settlement; there is no evidence that, had they been older or more literate, the settlement would have been larger or different. There is no evidence that the settlement itself is inadequate or unreasonable or could have been so discerned or proven.

2. **The Atkinsons Were Advised As They Chose**.

Mr. Atkinson's father, George Atkinson, described himself as a union negotiator, chosen to negotiate on behalf of his union with a major mining corporation. He offered a proposal of settlement which was rejected by IHC. The fact that the Atkinsons did not hold out for the terms of George Atkinson's alternative proposal does not mean that they failed to follow George Atkinson's advice or did not have its benefit.

Even the most experienced and competent of lawyers, arbiters and negotiators win some cases and lose others. The fact that George Atkinson's proposal did not prevail does not mean that a different proposal was unfair or fraudulent. Most negotiators ask for more than they expect; it is only speculation when the Atkinsons now argue they acted without George Atkinson's advice because his views did not prevail.

No one has reviewed (and no one needs to review) the reasonableness of the position George Atkinson urged during negotiations; no one has an obligation to prove that a rejected proposal was fair or reasonable or should have been imposed by a court. The fact that another proposal was made does not make that proposal fair, better or worse than the settlement approved by the Court.

To attempt to build a case of fraud in a court-approved settlement on the fact that some other proposal was not accepted is to engage in chimera. No one knows or can establish what might have occurred had the Atkinsons refused any settlement other than that proposed by George Atkinson. IHC refused his terms and has no burden to show why it did not yield to them.

No one knows at what point a refusal to compromise might have required court action by the Atkinsons. A jury might or might not have awarded $900,000 to their child. No one knows, and no one can know because there is no record of what <u>might</u> have been <u>if</u>. The Atkinsons' argument requires the Court to indulge in speculation; that is improper in the judicial process.

3. **<u>The Atkinsons Chose Not to Be Represented by Counsel</u>.**

IHC agrees with the position of Respondents Stephen G. Morgan and Morgan, Scalley & Reading in their response to the petition for rehearing. The Atkinsons consulted an attor-

ney but chose not to retain one. They were, with the aid of themselves and Mr. Atkinson's father, able to get approximately $1 million; there is no evidence that they might have gotten another sum otherwise. They might have gotten less and could have incurred large legal fees.

IHC also agrees that the Atkinsons have no claim of legal malpractice. An attorney representing one party when the other side chooses to appear pro se should be under no obligation to assist the pro se opponent as the Atkinsons urge.

4. **The Probate Court Made a Proper Determination.**

The Atkinsons' abdication of responsibility -- their argument that they relied on the judge to be sure things were fair -- raises several considerations. The first is that the Atkinsons, after conversing with an unidentified attorney, felt no need to sue because a settlement had been offered to them. The Atkinsons chose whether to offer the settlement for confirmation; they asked to be appointed guardians without bond for that purpose. (R. 421.) Their choices indicate their exercise of judgment and responsibility. After negotiating for a guaranteed $900,000, it is disingenuous for them now to claim that they relied on the judge to protect their child.

But, even if the Atkinsons did rely on the court, there is no evidence that their reliance on the court was misplaced, nor is there any evidence to show that the probate judge was concerned with anything other than the child's prot-

ection. The fact that the judge required the Atkinsons to post bond and file reports evidences the propriety and breadth of the judge's concern for the child. The Atkinsons' reliance on the judge does not require rehearing or reopening of the settlement. The Atkinsons have no proof that the settlement should not have been approved.

5. **Questioning the Judge Creates Serious Problems of Legal and Judicial Policy.**

Judge Fishler's resignation from the bench provided the parties with the unusual opportunity to obtain the affidavit and deposition of a judge who sat on a case. Although some situations exist in which judges have been questioned about their judicial tenure (e.g., when criminal charges have been filed), IHC respectfully submits that it is a dangerous precedent to permit a disgruntled litigant to question a judge as part of an appeal or a collateral attack on a judgment. The judicial process provides litigants with an appellate procedure and prescribed forms of collateral attack by rule and statute.

To permit a judge -- even one no longer active on the bench -- to be questioned about the judicial process creates a sharp departure in legal proceedings and may be the precursor of naming judges as defendants and seeking to find them liable for a new claim of judicial malpractice. Judicial decisions should be challenged under settled principles of law and judicial review, not on the recollections of judges about the

questions they asked or the thoughts they may have had in exercising their powers and applying their discretion. Such a departure in the judicial process should not develop from happenstance. A policy decision to modify the appellate process should arise from judicial rule or legislative enactment; a constitutional amendment may be required.

Despite the problems inherent in examining judicial memories, Judge Fishler's deposition and the affidavit give no reason why rehearing should be granted or why, ultimately, anyone should conclude that the settlement accepted by the Atkinsons for their child was not fair. Judge Fishler's testimony shows his proper judicial behavior with no violation of legal standard.

6. **The Affidavit of a Psychologist Should Carry No Weight.**

The affidavit of Richard King Mower offered by the Atkinsons in support of their petition should have no place in these proceedings. An attempt to raise a factual issue on a petition for rehearing is virtually unprecedented and certainly untimely. Moreover, the content of the affidavit offers nothing to assist the Court. It consists of quotations from court and deposition testimony and from this Court's decision, which Mr. Mower attempts to interpret.

Research has yielded no precedent in which a psychologist's analysis of a portion of the record has been substituted for the analysis of a judicial panel on a petition

for rehearing. The Atkinsons nowhere establish why Mr. Mower's inconclusive interpretation should be given deference or why his affidavit should be recognized by the Court on rehearing.

Even if the Atkinsons' statements were to be interpreted as Mr. Mower suggests and even if Mr. Mower is accurate that a juror could join him or oppose him on the subjects about which he opines, his views fail to demonstrate a triable issue as to the underlying propriety of the settlement. In short, his statements, even if accepted as the views of an expert in psychology, fall far short of establishing anything with enough legal merit to justify further proceedings by this Court. His affidavit does not show any impropriety in the summary judgment decision or in this Court's unanimous affirming opinion.

Litigants should not be permitted to create or offer new facts or new disputes on a petition for rehearing, as the Atkinsons attempt with the Mower affidavit; this is another distortion of the appellate procedure and a distortion of the concept of "record". It is a distortion which cannot be permitted without the approval of judicial rulemaking, legislative enactment or constitutional amendment. The judicial and appellate process should not so easily fall prey to untimely though imaginative efforts of counsel.

7. **<u>There Is No Meritorious Constitutional Claim</u>**.

Neither Mr. Mower's inconclusive views about the Atkinsons' statements nor his lay analysis of judicial reason-

ing nor anything else argued by the Atkinsons creates a constitutional issue at this untimely juncture. The standards for granting summary judgment are clear and were properly recognized by this Court in affirming the trial court. Summary judgment has long been recognized as a proper and constitutional means of resolving litigation, in no manner creating a denial of constitutional right to jury trial. Constitutional questions do not shine from the murky analysis and arguments of the Petitioners.

8. **Valid Justifications for Summary Judgment Remain Unscathed.**

The Atkinsons' petition for rehearing purports to raise three issues about the case, none of which is valid, as demonstrated. The Atkinsons do not attack the numerous grounds for summary judgment which were previously argued and which still justify this Court's unanimous decision. The Atkinsons' attack on the settlement is barred by all possible limitations periods pertaining to medical malpractice claims. See Utah Code Ann. §§ 78-14-3(29), 78-14-8, 78-14-4(1). Their fraud and misrepresentation claims, insofar as they may be construed as separate from the underlying medical/injury claim, are barred by a three-year limitation period. Utah Code Ann. § 78-12-26(3). Their fraud and misrepresentation claims are further barred by their refusal to rescind the settlement agreement -- they have received and continue to retain its benefits. The Atkinson's claims were previously settled in open court, so

this action is collaterally estopped. Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978), see also Robertson v. Campbell, 674 P.2d 1226 (Utah 1983); Berry v. Berry, 738 P.2d 246 (Utah App. 1987).

The evidence is uncontradicted that the Atkinsons refused an offer at no charge to have the child independently evaluated out of state. In open court, the Atkinsons acknowledged that their child had brain damage. In open court, Mrs. Atkinson acknowledged that by settling they could not again claim against IHC, even if the child's condition worsened. The release filed in open court recites the financial provisions of the settlement and also states that the extent and permanence of damage to the child may not be known. The parents acknowledged in open court that they believed their child had a claim, and Mr. Atkinson responded coherently when the $900,000 amount of the settlement was mentioned by the probate judge. All of these factors support summary judgment against the Atkinsons.

There is no merit to any claim or argument by the Atkinsons to invalidate summary judgment against them; ample grounds for summary judgment exist and persist even against the speculative reasons the petitioners offer for reargument.

CONCLUSION

It is the mark of a competent and qualified judiciary that it attends carefully to allegations of error. However, a

mere allegation of error supported by purported facts raised post-appeal and alleged disputes over facts insufficient to prove the merits of an underlying claim do not justify reargument. The Atkinsons' petition for reargument lacks merit and should be denied. IHC seeks such other and further relief, including costs, as may be just and proper.

Dated: September 27, 1990.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned attorney for respondent IHC Hospitals, Inc. a/k/a Intermountain Health Care Hospitals, Inc. hereby certifies that on September 27, 1990, she caused the foregoing IHC Hospitals, Inc.'s Brief Opposing Petition for Rehearing to be served on all of the parties by mailing copies thereof by first class mail, postage prepaid, addressed to their attorneys, as follows:

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